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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October 2000 Term

Wayne Joe Brewer,
Petitioner,

v.

The State of Colorado
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, State of Colorado

PETITION FOR A WRIT OF CERTIORARI

Wayne Joe Brewer, *pro se*
2346 E. Niagra
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2 pp

QUESTIONS PRESENTED

Was the determination of the Court of Appeals to uphold a determination by the trial court that the Petitioner herein knowingly and willingly waived assistance of counsel was error.

Did the trial court abuse its discretion when it denied substitute counsel to indigent defendant based on the finding that Brewer effected a voluntary waiver by his conduct, notwithstanding the absence of a finding that Brewer knowingly and willingly undertook a course of conduct evincing an unequivocal intent to relinquish or abandon his right to legal representation?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wayne Joe Brewer, petitions this Honorable Court to issue a Writ of Certiorari to the State of Colorado Court of Appeals for review of Case Number 96CA0592, an appeal from the District Court of Montrose County, Honorable J. Stephen Patrick, Judge, Case Number 96CR173.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is an unpublished decision cited as People v. Brewer, 96CA2213. The opinion of the trial court is unpublished.

STATEMENT OF JURISDICTION

A Petition to the Colorado Supreme Court for writ of certiorari to the Colorado Court of Appeals was denied September 27, 1999. The Colorado Court of Appeals entered its mandate on October 25, 1999. The Jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The sixth amendment made applicable to the states by the fourteenth amendments to the United States Constitution provides in the pertinent parts:

In all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense.

STATEMENT OF THE CASE

Brewer was charged with Felony Menacing, a class five felony § 18-3-206, C.R.S. (1998). Unable to afford representation, Brewer was granted court-appointed counsel. At a preliminary hearing Brewer was represented by public defender Stephen Dooley ("Dooley") wherein he pled not guilty. At the trial setting conference the court dismissed Dooley at Brewer's insistence. Brewer claimed irreconcilable differences with Dooley. Notwithstanding Brewer's demand for substitute counsel, the court gave Brewer the choice to hire an attorney or proceed pro se. Brewer remained silent throughout the trial with the exception of repeated demands for representation by counsel. Brewer was convicted by a jury and was sentenced to three years of probation and 90 days in jail.

Brewer, acting pro se, filed a Crim P. 35(c) Motion for Relief from Judgment alleging that the trial court abused its discretion by violating his sixth amendment right to counsel. The motion was denied. Brewer appealed the case to the Court of Appeals, which affirmed that the trial court did not abuse its discretion by refusing to provide substitute counsel to Brewer.

REASONS FOR GRANTING THE WRIT

The right to counsel is a fundamental right guaranteed by the Sixth Amendment and is essential to a fair trial. See *Argersinger v. Hamlin*, 407 U.S. 25, 32, 92 S.Ct. 2006, 2010, 32 L.Ed.2d 530 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796-97, 9 L.Ed.2d 799 (1963); *People v. Arguello*, 772 P.2d 87, 92 (Colo.1989); *Anaya v. People*, 764 P.2d 779, 781 (Colo.1988); *People ex rel. Gallagher In and For Eighteenth Judicial Dist. v. District Court In and For County of Arapahoe*,933 P.2d 583,588 (Colo. 1997) *People v Woods*, 931 P.2d 530 (Colo. App. 1996). In *Gideon v. Wainwright*, supra, the United States Supreme Court held that the sixth amendment's guarantee of counsel is a fundamental right "made obligatory upon the States by the Fourteenth Amendment," and therefore the fourteenth amendment requires appointment of counsel for indigent Defendant in state court.[Emphasis added]

In *Argersinger v. Hamlin*, supra at 37, 92 S.Ct. at 2012, it was held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[Emphasis added]

"Consequently, an attorney must be provided to represent indigent Defendant accused of crimes if imprisonment is to be imposed." *Stern v. County Court In and For County of Grand*, 773 P.2d 1074,1076 (Colo. 1989)

"Courts have set forth several general principles for assessing the validity of a waiver. Courts must *indulge* every reasonable presumption against finding a waiver of the fundamental right to counsel." [Emphasis added] *Johnson v. Zerbst*, 304 U.S. at 464, 58 S.Ct. at 1023;*United States v. Williamson*, 806 F.2d 216 (10th Cir.1986);*United States v. Gipson*, 693 F.2d 109 (10th Cir.1982), cert. denied, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983).

"In order for a court to conclude that an accused has impliedly waived counsel, the record as a whole, including the reasons proffered by Brewer for not having counsel, must show that Brewer knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon his right to legal representation." [Emphasis added] *King v. People*, 728 P.2d at 1269. "Courts must indulge every reasonable presumption against finding a waiver of the fundamental right to counsel." [Emphasis added] *Johnson v. Zerbst*, 304 U.S. at 464, 58 S.Ct. at 1023; *United States v. Williamson*, 806 F.2d 216 (10th Cir.1986); *United States v. Gipson*, 693 F.2d 109 (10th Cir.1982), cert. denied, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable or unfair. *People v. Crow*, 789 P.2d 1104 (Colo. 1990).

In the instant case, the Brewer, an indigent, was appointed a public defender by the court but claimed

irreconcilable differences with the said attorney and demanded that the court provide substitute counsel. The trial court granted the Brewer's motion for withdrawal of counsel, but denied him substitute counsel, and gave him the option of hiring his own, accepting the court appointee or proceeding pro se. The Brewer exercised none of the options, and remained mute at trial relative to the merits of the case, while demanding assistance of counsel at every opportunity through the course of the trial proceedings.

No knowing and intelligent "voluntary" waiver of right to counsel, express, implied, or other, was found by the court to have been made by Brewer. Neither was the Brewer ever notified that his conduct could be construed as, or was tantamount to, a knowing and voluntary waiver of counsel. Nor does the record reflect otherwise. Nor does the record show that the Brewer knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon his right to legal representation.

The appellate court upheld the finding of the Crim P. 35(c) court that the Brewer had not been denied competent counsel on grounds that Brewer had engaged in a course of conduct designed to manipulate his right to counsel in such a manner as to delay resolution of the case, but failed to support this conclusion with the requisite finding that the Brewer knowingly and willingly undertook a course of conduct evincing an unequivocal intent to relinquish or abandon his right to legal representation. Absent the requisite finding, the conclusion that Brewer manipulated his right to counsel in such a manner as to delay resolution of the case is unfounded.

CONCLUSION

The Writ should be granted on grounds that both the trial abused its discretion and the appellate courts failed to adhere to clearly established law relative to Brewer's sixth amendment right to counsel, finding instead that the Brewer had voluntarily waived counsel notwithstanding the absence of a finding of fact of requisite element necessary to support the determination of voluntary waiver-- that Brewer knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon his right to legal representation.

Respectfully submitted this 27 day of December, 1999

WJB

Wayne Joe Brewer
2346 E. Niagra Montrose,
Colorado 81401

Status : CLSD District Court, Montrose County

Case #: 1996 CR 000173 Div/Room: 2 Type: Menacing

The People of Colorado vs. BREWER, WAYNE JOE

FILE DATE EVENT/FILING/PROCEEDING

3/12/1998 -- Minute; Order (print)
JUDGE: JSP CLERK: LMS REPORTER:

THE COURT HAS REVIEWED THE MOTION FOR RELIEF FROM JUDGMENT. THE PEOPLE HAVE FILED NO RESPONSE. THE THRUST OF THE MOTION IS THAT DEFENDANT HAS BEEN DENIED HIS RIGHT TO COUNSEL UNDER GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S.CT. 792, 9 L.ED.2D 799 (1963). THE COURT DOES NOT QUARREL WITH THE LINE OF CASES DEFENDANT HAS CITED. THE FACTS OF THOSE CASES DO NOT APPLY HERE.

DEFENDANT HAD COURT APPOINTED COUNSEL. THE APPLICATION FOR THE PUBLIC DEFENDER WAS COMPLETED OCTOBER 1, 1996 AND THE REQUEST WAS GRANTED OCTOBER 6, 1996 BY MONTROSE COUNTY JUDGE GREENACRE. THEY ENTERED THEIR APPEARANCE AT THE ARRAINMENT MARCH 7, 1997 DEFENDANT DISCUSSED AT LENGTH HIS CONCERNS WITH THE PUBLIC DEFENDER BUT ULTIMATELY ELECTED TO PROCEED WITH THAT REPRESENTATION. TRIAL WAS SET TO COMMENCE SEPTEMBER 5, 1997. ON THE TRIAL DATE, A CONTINUANCE WAS GRANTED AT DEFENDANT'S REQUEST. AT THE SCHEDULED

RESETTING, OCTOBER 17, 1997, DEFENDANT FIRED THE PUBLIC DEFENDER. A COPY OF THE ORDER ENTERED THAT DATE IS ATTACHED. ON THE MORNING OF TRIAL, JANUARY 22, 1998, DEFENDANT DEMANDED APPOINTMENT OF COUNSEL. NO COMMUNICATION WITH THE COURT OCCURED BETWEEN THE ORDER OF OCTOBER 17 AND JANUARY 22, 1998.

DEFENDANT HAS NOT BEEN DENIED COMPETENT COUNSEL. DEFENDANT KNOWINGLY AND VOLUNTARILY ELECTED TO TERMINATE THE SERVICES OF THE PUBLIC DEFENDER, ELECTED TO TAKE NO FURTHER ACTION UNTIL THE MORNING OF TRIAL, WHICH HAD PREVIOUSLY BEEN CONTINUED AND RESET AT DEFENDANT'S REQUEST.

DEFENDANT HAS ENDEAVORED TO MANIPULATE THE SYSTEM THROUGHOUT THESE PROCEEIDINGS. THERE WAS NO SUBSTANTIATION OF THE SERIOUS ALLEGATIONS THAT THE PUBLIC DEFENDER WAS INCOMPETENT OR THAT HE WAS "PROSECUTING" HIM. MORE PARTICULARLY, THE PUBLIC DEFENDER SUCCESSFULLY KEPT ONE FELONY COUNT FROM BEING BOUND OVER FOR TRIAL.

THE APPLICATION FOR THE PUBLIC DEFENDER OMITS DEFENDANT'S SPOUSE'S REAL PROPERTY AND SUGGESTS THAT HE PAYS HER NEARLY 90% OF HIS INCOME AS RENT. ACCORDINGLY, THERE IS A SERIOUS QUESTION WHETHER DEFENDANT WAS GENUINELY ENTITLED TO A COURT APPOINTED ATTORNEY. DEFENDANT PRESENTED NO EVIDENCE OF ANY

EFFORTS TO ENGAGE SEPARATE COUNSEL BETWEEN OCTOBER AND THE TRIAL IN JANUARY.

THE MOTION IS DENIED.

XC: DA; DEFENDANT

/LMS

COLORADO COURT OF APPEALS March 11, 1999
No. 98CA0592 NOT SELECTED FOR PUBLICATION

The People of the State of Colorado,
Plaintiff - Appellee

V.

Wayne Joe Brewer,
Defendant – Appellant

Appeal from the District Court of Montrose County
Honorable J. Stephen Patrick, Judge
No. 96 CR173

Gale A. Norton, Attorney General, Martha Philips Allbright, Chief Deputy Attorney General, Richard Westfall, Solicitor General, Christine Cates Brady, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Wayne Joe Brewer, Pro se

Defendant, Wayne Joe Brewer, appeals the trial court's order denying his motion for post-conviction relief pursuant to Crim P. 35(c). We affirm.

Defendant was originally charged with two counts of felony menacing. one of the charges was dismissed, and following a Jury trial at which he represented himself, defendant was convicted of the remaining charge.

After sentencing, defendant, acting pro-se, filed a motion pursuant to Crim. P. 35(c), claiming that the trial court erred by failing to appoint substitute counsel to represent him after he fired his court-appointed attorney. He claimed that the court essentially forced him to proceed pro se, thus violating his constitutional right to counsel. The trial court denied the motion without holding a hearing.

On appeal, defendant contends that the trial court abused its discretion by failing to appoint substitute counsel to represent him and that the Crim P. 35(c) court erred by denying him his motion on that basis. We disagree.

The right to counsel is a fundamental right guaranteed by the Sixth Amendment and is essential to a fair trial. People v. Woods, 931 P.2d 530 (Colo. App. 1996). However, an indigent criminal defendant does not have an absolute right to counsel of choice in all cases. Moreover, a defendant may not manipulate his right to counsel in such a manner as to impede the efficient administration of justice. People v. Barnes, 636 p. 2d 1323 (Colo. App. 1981)

When an indigent criminal defendant voices objections to court-appointed counsel, the trial court must inquire into the reasons for the dissatisfaction. A trial court

is not required to hold a hearing on such issues, however, and the extent of the inquiry required depends on the circumstance of each case. See People v. Bolton, 859 P. 2d 303 (Colo. App. 1993).

Before a change in counsel is warranted, the trial court must find "some well founded reason for believing that the appointed attorney cannot or will not completely represent" the defendant. People v. Arguello, 772 P. 2d 87, 94 (Colo. 1989). A trial court is not required to appoint substitute counsel unless the defendant can establish good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict. People v. Arguello, supra.

If the court determines that substitution is not warranted, defendant must be given a "clear choice" between present counsel and waiver of counsel. And when an indigent defendant refuses without good cause to proceed with representation by a competent court-appointed attorney, a voluntary, albeit implied, waiver of the right to counsel has occurred. People v. Harris, 914 P.2d 434 (Colo. App. 1995).

We may only reverse the trial court for failure to appoint substitute counsel when there has been a clear abuse of discretion. Riley v. District Court, 181 Colo. 90, 507 P. 2d 464 (1973). A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable or unfair. People v. Crow, 789 P.2d 1104 (Colo. 1990).

Here, prior to his arraignment, defendant wrote a letter to the court indicating that he was dissatisfied with appointed counsel's representation of him. Specifically,

defendant reported that during their initial meeting counsel did not take notes that could be used to prepare a written brief. Defendant further claimed that counsel was ineffective because he advised defendant to plead guilty, and he did not obtain free copies of "court documents" or arrange for defendant to attend a hearing, and failed to challenge the search of the defendant's home.

Finally, defendant complained that counsel "displays a combative arrogant attitude towards me," and that counsel did not make sufficient efforts to accommodate defendant's physical disability.

Defendant failed to appear for his arraignment, and the court issued a warrant for his arrest. His attorney indicated that defendant had abruptly terminated one of his calls and had refused to communicate with him.

Defendant was rearrested, and, following discussions with the court at a bond hearing regarding his dissatisfaction with counsel, defendant indicated that he wanted appointed counsel to continue to represent him.

At his arraignment, defendant did not express any concerns about counsel. The court set the trial for September 5, 1997, and directed defendant to stay in contact with his attorney.

On the day scheduled for trial, the trial was continued at defendant's request. At the hearing on defendant's motion for continuance, the court emphasized that this is getting to be an old case, and, in response to defendant's renewed expressions of dissatisfaction with counsel, told defendant that if he intended to obtain a different attorney, he should do

so prior to the trial scheduling conference to avoid further delays. Defendant indicated that he would do so.

According to the record, defendant appeared with appointed counsel at the scheduling conference on October 17, 1997, but told the court that he believed counsel was incompetent and claimed that counsel was "prosecuting him." Defendant indicated that he refused to proceed represented by the appointed attorney, and requested that the attorney be dismissed. The court permitted counsel to withdraw, and advised defendant that he could either proceed pro se or hire another attorney at his own expense. The court then set the matter for trial on January 22, 1998, and admonished defendant that the trial would not be continued "for late engagement of counsel."
Defendant did not obtain substitute counsel and appeared for trial pro se demanding a competent attorney. He had not indicated, either prior to trial or the morning of the trial, that he had attempted to obtain an attorney, or that he needed additional time to do so.

The court then made opening remarks to the parties regarding evidentiary and other procedural issues and advised defendant regarding his right to testify. In response to defendant's repeated demands for an attorney, the court reminded him that, at his request, counsel had been discharged, that he had been given his clear choice between hiring another attorney or proceeding pro se, and that he had been advised that the trial would not be continued to enable him to obtain substitute counsel.

We reject defendant's contention that the trial court failed to inquire adequately into the reasons for his dissatisfaction with counsel, that he had established that there had been a complete breakdown of communication

with counsel, or that counsel had an irreconcilable conflict that prevented him from competently representing defendant. To the contrary our review of the record before us indicates that the trial court conducted an inquiry sufficient to determine the reasons for defendant's request that counsel be dismissed, and that it determined that defendant's complaints about counsels competence were unfounded.
The record further reflects that the trial had been continued once before at defendant's request, that he had failed to appear for at least one hearing, that he had generally been uncooperative with counsel and the court, that there was no communication with the court between October 17 and January 22, 1998, and that he did not request the appointment of substitute counsel until the morning of trial.

Moreover, we note that the transcript of the scheduling hearing at which counsel was dismissed is not part of the record on appeal. It is the defendant's responsibility to furnish this court with a record on appeal that supports his allegations of reversible error. Any facts not appearing in the record cannot be reviewed, and we must presume that material portions omitted from the record would support the trial court's judgment. People v. Wells, 776 P.2d 386 (Colo. 1989); People v. Helmstetter, 914 P.2d 474 (Colo. App. 1995). We thus presume that the transcript of the scheduling hearing contained facts supporting the trial court's determination.

Based on this record, the Crim P. 35(c) court found that defendant engaged in a course of conduct designed to manipulate his right to counsel in such a manner as to delay resolution of the case. The Crim P. 35(c) court thus found that defendant had not been denied competent counsel.

Our review of the record supports the trial court's conclusion. See People v. Smith, 881 P.2d 385 (Colo. App. 1994).

Accordingly, the order is affirmed.
JUDGE JONES AND JUDGE ROY concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 99SC422
CERTIORARI TO THE COLORADO COURT OF APPEALS, 98 CA 0592
DISTRICT COURT, MONTROSE COUNTY, 96CR173

ORDER OF COURT

JOE BREWER,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of the said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 27, 1999
JUSTICE KOURLIS does not participate.